U.S. Department of Labor

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Issue Date: 18 May 2006

Case No.: 2005-BLA-05802

In the Matter of

RICHARD CHARLES ACHUFF
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Richard Charles Achuff
Pro Se

Adam F. Welsh, Esquire
For Director

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On April 21, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. The hearing was held before me in Wilkes-Barre, Pennsylvania, on January 9, 2006, where the parties had full opportunity to present evidence and argument. Claimant was granted additional time to submit a report from

[1] The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725.

his physician. (T 22-23)[2] On January 27, 2006, Claimant submitted two statements by Dr. Patrick J. Kerrigan dated August 29, 2005 and January 1, 2006. These records are herewith received in evidence as CX 1 and CX 2, respectively. Director was granted additional time to submit a report from Dr. Rashid. (T 25) On March 13, 2006, Director submitted Dr. Navani's chest X-ray interpretation dated February 28, 2006 (DX 30), Dr. Rashid's medical report dated February 9, 2006 (DX 31), an arterial blood gas study dated February 9, 2006 (DX 32), a pulmonary function test dated February 9, 2006 (DX 33), and Dr. Rashid's curriculum vitae (DX 34). These records are herewith received in evidence. Claimant did not file a brief. Director filed a brief on April 10, 2006. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:

(1) the length of Claimant's coal mine employment history;

(2) whether Claimant has pneumoconiosis;

(3) whether Claimant's pneumoconiosis arose out of his coal mine employment;

(4) whether Claimant is totally disabled;

(5) whether Claimant's total disability is due to pneumoconiosis; and

(6) whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed his first claim for benefits on June 25, 2002. On January 23, 2003, the District Director denied the claim, finding that Claimant had failed to establish any of the elements of entitlement. (DX 1) Claimant did not appeal the District Director's findings and the denial became final.

Claimant filed the instant claim for benefits on April 13. 2004. (DX 3) On March 17, 2005, the District Director denied the claim, finding that Claimant had failed to establish any of the elements of entitlement. (DX 23) Claimant requested a formal hearing on March 22, 2005. (DX 24)

[2] The following abbreviations are used herein: "CX" refers to Claimant's Exhibits; "DX" refers to Director's Exhibits; and "T" refers to the transcript of the January 9, 2006 hearing.

B. Factual Background

Claimant was born on August 20, 1935. (DX 7) He married Beverly Mills on June 26, 1965, and she is his only dependent for purposes of augmentation of benefits. (DX 3, 8) Claimant testified that his first coal mining job was with Talamelli Coal Company (Talamelli). (T 10) He stated that he drove a tractor hauling coal over to the breaker and into coal cars. (T 11, 12-13) Claimant testified that he worked two or three days a week as an extra for approximately a year. (T 13, 30) During that time he was paid cash, but was later placed on Talamelli's payroll when he became a full-time worker under a United Mine Worker's contract. (T 13-14) Claimant testified that he worked full-time for Talamelli for three or four months. (T 14) Claimant's next coal mine employment was for Tom Flynn Fuel Company hauling coal to residences, factories, and plants for heating. (T 5-6, 14, 29).

Presently, Claimant complains of trouble breathing. Claimant is only able to walk one block or ascend four to five stairs at a time due to shortness of breath. He is currently using an inhaler and a breathing machine to aid his breathing. Claimant stated that he smoked three packs of cigarettes a day for 40 years, but quit smoking 20 years ago. He had surgery in 2004 to drain a lung abscess and was also diagnosed with an irregular heart beat and emphysema. (T 18-29)

C. Relevant Medical Evidence

Claimant's medical records include two admissions to Wilkes-Barre General Hospital from March 23 through March 29, 2004 and March 30 through April 2, 2004. On March 23, 2004, Dr. Patrick Kerrigan examined Claimant and issued a History and Physical report. Claimant presented to the hospital with chest pain. The physician noted that Claimant had previously been diagnosed with bullous emphysema and had an outpatient stress test that showed evidence of ischemia. Dr. Kerrigan also noted that Claimant's past medical history included chronic obstructive pulmonary disease in the form of bullous emphysema, iron deficiency anemia, bulging disc, and degenerative disc disease. The physician also noted that Claimant had a smoking history of three packs of cigarettes a day but stopped smoking 10 years ago. Claimant received sublingual nitroglycerin, was placed on supplemental oxygen, and transferred to the emergency room. On physical examination, Dr. Kerrigan found that Claimant's chest showed intercostal retractions upon inspiration and expiration with pectus excavatum and increased thoracic kyphosis. The physician also found that Claimant's heart had a regular sinus rhythm with a grade II/VI systolic ejection murmur at the left sternal border and evidence of an S3. Dr. Kerrigan also found that Claimant's lungs revealed decreased breath sounds evident at the lung bases with occasional expiratory wheeze. The physician diagnosed Claimant with unstable angina, suspicion of underlying coronary artery disease, severe bullous emphysema, and iron deficiency anemia. (DX 11)

Dr. Joseph Briskie performed a cardiac consultation on March 23, 2004. Claimant reported experiencing bouts of chest pain and shortness of breath. The physician noted Claimant's extensive tobacco history. Dr. Briskie also noted Claimant's history of underlying chronic obstructive pulmonary disease and that his most recent stress test showed ischemic changes. The physician also noted that Claimant's electrocardiogram showed no acute changes. On physical examination Dr. Briskie found that Claimant's heart was regular and his lungs were

clear. The physician diagnosed Claimant with chest pain syndrome, underlying coronary insufficiency, tobacco abuse, chronic obstructive pulmonary disease, and family history of heart disease. (DX 11)

Claimant's medical records also include a cardiac catheterization report by Dr. Joseph Briskie. The physician diagnosed Claimant with mild obstructive disease with preserved systolic function. Dr. Briskie opined that Claimant's chest pain symptoms were probably non-cardiac in origin. The physician cleared Claimant to undergo a bronchoscopy. (DX 11)

Claimant underwent a CT chest scan on March 23, 2004. Dr. John Rusu found bullous emphysematous changes in Claimant's right upper lung zone with a large emphysematous bulla measuring about nine centimeters in diameter. The physician also found a couple of small pellet-like metallic densities in Claimant's right upper lung zone and atelectasis/consolidation of the right upper lung lobe, which he associated with right hilar adenopathy and/or mass. Dr. Rusu suggested a bronchoscopy be performed for further evaluation. The physician noted a small left adrenal mass, which he opined most likely represented an adenoma. Dr. Rusu also suggested a follow-up CT scan be performed in three months. (DX 11)

Dr. Gary R. Decker performed a consultation for pneumonia on March 25, 2004. The physician noted that Claimant's medical history included chronic obstructive pulmonary disease, bullous emphysema, coronary disease, degenerative disc disease of lumbar spine, and cataracts. Dr. Decker also noted that Claimant had undergone a cardiac catheterization. Claimant reported having a cough productive of a mucopurulent, foul tasting sputum for about six months. The physician noted that Claimant had been diagnosed with possible post obstructive pneumonia or secondarily bullous lesion of the right upper lung lobe by Dr. Stepanitis. Dr. Decker also noted that Claimant reported smoking three packs of cigarettes a day. On physical examination the physician found that Claimant's chest had an increased anterior posterior diameter and that his lungs revealed a right upper lobe zone with wet rales but a clear left lung. Dr. Decker also found that Claimant's heart showed no murmurs, rubs, or gallops. The physician diagnosed Claimant with post obstructive pneumonia with the need to rule out pyogenic lung abscess, tuberculosis, and fungal illness. (DX 11)

Claimant's medical records include a Discharge Summary by Dr. Patrick Kerrigan dated March 29, 2004. The physician noted that during hospitalization Claimant underwent a cardiac catheterization on March 24, 2004, a bronchoscopy on March 26, 2004, a CT scan of the chest, intravenous therapy, and respiratory therapy. Claimant's diagnoses upon discharge were chest pain of unknown etiology, suspicion of post obstructive pneumonitis right upper lobe, acute exacerbation of chronic obstructive pulmonary disease, and supraventricular tachycardia. (DX 11)

Claimant again presented to the hospital on March 30, 2004, with severe shortness of breath. Dr. Kerrigan examined Claimant and issued a History and Physical report dated March 30, 2004. Claimant's wife reported that Claimant had been shaking, experiencing visible rigors, and had a body temperature of 102. Claimant complained of "burning up," extreme weakness, dyspnea upon minimal exertion, cough productive of yellowish mucous, and three pillow orthopnea. The physician noted that Claimant had previously been hospitalized for chest pain,

post-obstructive pneumonitis of the right lower lobe, exacerbation of chronic obstructive pulmonary disease, and supraventricular tachycardia. Dr. Kerrigan also noted that Claimant had a smoking history of three packs of cigarettes a day but that he had quit 10 years ago. On physical examination the physician found that Claimant's chest showed intercostal retractions upon inspiration and expiration with pectus excavatum and increased thoracic kyphosis. Dr. Kerrigan also found that Claimant's heart had a regular sinus rhythm with a grade II/V holosystolic ejection murmur at the left sternal border and his lungs revealed scattered rhonchi and wheezes in all fields anteriorly and posteriorly and decreased breath sounds at the right upper lobe. The physician diagnosed Claimant with acute respiratory insufficiency, suspicion of recurrent post-obstructive pneumonitis of the right upper lobe, severe bullous emphysema, exacerbation of chronic obstructive pulmonary disease, mild coronary artery disease, and iron deficiency anemia. (DX 10)

Claimant's medical records also include a chest X-ray report dated March 30, 2004. Dr. Ronald C. Reese compared this study to a previous study dated March 23, 2004. The physician found extensive bullous emphysematous changes in Claimant's right upper lobe. Dr. Reese also found dependent bullae filled with fluid and an inferior deflection of the minor fissure. The physician opined that Claimant's chest had an overall appearance stable and suggested that exclusion of pulmonary tuberculosis may be warranted. (DX 10)

Claimant was discharged from the hospital on April 2, 2004, and Dr. Kerrigan issued a Discharge Summary on the same day. The physician noted that Claimant had received intravenous therapy, respiratory therapy, and insertion of a PICC line on April 1, 2004. Claimant's diagnoses upon discharge were "infected bleb right upper lung lobe (post obstructive pneumonitis) – anthrasilicosis induced," acute respiratory insufficiency, severe bullous emphysema, acute exacerbation of chronic obstructive pulmonary disease, mild coronary artery disease, supraventricular tachycardia, and iron deficiency anemia. (DX 10)

D. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

The record contains a prior claim filed in 2002. The District Director denied the prior claim because Claimant failed to establish any of the elements of entitlement. Section 725.309(d) provides that the following rules shall apply in adjudicating subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.
>
> (4) If claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim.

§ 725.309(d).

Therefore, the instant "subsequent claim," or current claim, must be denied unless Claimant demonstrates that one of the applicable conditions of entitlement has changed since the denial of the prior claim. Id.

E. Length of Coal Mine Employment

Claimant alleges five years of coal mine employment. (T 5) Director argues that Claimant established, at most, several months of coal mine employment. (Dir's Br. at 4)

The regulations provide that, "to the extent the evidence permits, the beginning and ending dates of coal mine employment shall be ascertained." § 725.101(a)(32)(ii). Section 725.101(a)(32) provides that a "year" means: "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" § 725.101(a)(32). If the evidence establishes that the miner worked in coal mining at least 125 days during a calendar year, then the miner has worked one year in coal mine employment for all purposes under the Act. § 725.101(a)(32)(i).

A calculation of coal mine employment history must be based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. Clayton v. Pyro Mining Co., 7 B.L.R. 1-551 (1984); Schmidt v. Amax Coal Co., 7 B.L.R. 1-489 (1984). Social Security earnings records and coal mine employment forms submitted with the claim may constitute substantial evidence. Schmidt, 7 B.L.R. 1-489 (1984); Harkey v. Alabama By-Products Corp., 7 B.L.R. 1-26 (1984). When relying on these records, the Board has held that

counting quarters in which the miner earned $50.00 or more, while not counting the quarters in which he earned less, is a reasonable method of computation. Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984). A calculation of coal mine employment history may also be based on Claimant's testimony where it is uncontradicted and credible. Gilliam v. G & O Coal Co., 7 B.L.R. 1-59 (1984).

Claimant testified that he worked for Talamelli for a period of a little over a year hauling coal to the breaker and loading it into coal cars. (T 11) He also testified that during his first year of employment he worked two to three days a week and was paid cash for his services. It was not until he was included on a United Mine Worker's contract that he was added to Talamelli's payroll. (T 12-14, 30)

As stated above, the regulations define a "year" as a period of one calendar year or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 days. § 725.101(a)(32). If the miner can establish that he worked in coal mining for at least 125 days during a calendar year, then the miner will be credited with one year of coal mine employment under the Act. § 725.101(a)(32)(i). Claimant stated that he worked two to three days a week continuously throughout the year, which would give him between 104 and 156 working days. The average between the two is 130 days, placing Claimant over the 125 day requirement. Although Claimant did not state that he worked 125 days during the year he worked for Talamelli, I find his testimony credible and find that Claimant established at least one year of coal mine employment.

Claimant also testified that he was on Talamelli's payroll for a period of time after being hired full-time on a United Mine Worker's contract. I shall rely on Claimant's earnings records and credit Claimant with those quarters where he earned at least $50.00 in coal mining. See Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984). Claimant's Social Security earnings records show that Claimant earned $765.85 in the second quarter of 1963 and $26.68 in the third quarter of 1963. As Claimant earned more than $50.00 in the second quarter of 1963, I find that Claimant has established an additional three months of coal mine employment.

Claimant also testified that he hauled retail coal to residences and factories for heating when he worked for Tom Flynn Coal Company. (T5-6, 30) However, to qualify as coal mine employment, Claimant must have worked in the extracting, preparing, or processing of raw coal, not in the delivering of the finished product to the ultimate consumers. See Foster v. Director, OWCP, 8 B.L.R. 1-188 (1985). Therefore, I find that Claimant's employment with Tom Flynn Coal Company does not qualify as coal mine employment as defined under the Act.

Accordingly, I credit Claimant with a coal mine employment history of 1¼ years.

F. Elements of Entitlement

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

(1) X-ray evidence. § 718.202(a)(1).

(2) Biopsy or autopsy evidence. § 718.202(a)(2).

(3) Regulatory presumptions. § 718.202(a)(3).

a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

(4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

The Third Circuit has held that, in considering whether the presence of pneumoconiosis has been established, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 25 (3d Cir. 1997). This case arises in the jurisdiction of the Third Circuit because Claimant's coal mine employment took place in Pennsylvania.

X-ray evidence, § 718.202(a)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains the following chest X-ray evidence.[3]

[3] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS
08/02/2004	08/02/2004	DX 17	Dr. Levinson	--	Negative
08/02/2004	08/16/2004	DX 18	Dr. Navani	BCR, B-reader	Negative
02/09/2006	02/28/2006	DX 30	Dr. Navani	BCR, B-reader	Negative

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The chest X-ray taken on August 2, 2004, was interpreted as negative by Drs. Levinson and Navani. Consequently, I find this X-ray is negative for the presence of pneumoconiosis.

The chest X-ray taken on February 9, 2006, was interpreted as negative by Dr. Navani. Accordingly, I find that the chest X-ray is negative for the presence of pneumoconiosis.

I find that the X-ray evidence as a whole does not support a finding of the presence of pneumoconiosis.[4]

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray,

[4] Claimant also submitted a chest X-ray reading by Dr. Smith dated June 8, 2004, of Claimant's August 3, 2002 chest X-ray. However, a subsequent claim requires that Claimant prove that there has been a change in a condition through "new" evidence. § 725.309(d)(3). As this chest X-ray is from 2002 and readings of the chest X-ray by other physicians were considered in Claimant's prior claim, it does not constitute "new" evidence and cannot be considered in determining whether Claimant has established a change in conditions pursuant to § 725.309(d).

biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

An opinion is reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

The current record contains the following physician's opinions.

Dr. Patrick J. Kerrigan

Dr. Patrick J. Kerrigan, Claimant's treating physician, issued a letter dated August 29, 2005. The physician noted that Claimant has been under his medical care since March 11, 2002. Dr. Kerrigan stated that his "medical impression is that [Claimant] suffers from Chronic

Obstructive Pulmonary Disease induced by Anthracosilicosis as he previously worked in a coal mine. His respiratory status, in my opinion is severely impaired due to his previous occupation." (CX 1) Dr. Kerrigan also issued a supplemental note dated January 1, 2006, in which he stated, "I examined [Claimant] in my office today. It is my opinion that his COPD/emphysema has been induced from working in the coal mines." (CX 2) However, the physician failed to explain what medical evidence he relied upon in coming to the conclusion that Claimant has pneumoconiosis. Therefore, I find that Dr. Kerrigan's opinion is unreasoned and undocumented and entitled to no weight.[5]

Dr. Sander J. Levinson

Dr. Sander J. Levinson (Board-certified in internal medicine and pulmonary disease) examined Claimant on August 2, 2004, and issued a report on the same day. The physician credited Claimant with four years of coal mine employment and considered a smoking history of two packs of cigarettes a day for 42 years and that Claimant stopped smoking 15 years ago. Dr. Levinson relied on his physical examination of Claimant, a chest X-ray, pulmonary function test, arterial blood gas study, and an electrocardiogram all dated August 2, 2004. The physician noted that Claimant had been hospitalized in May 2004 for "bulb drained in right lung." Claimant reported having occasional wheezing, dyspnea upon walking one-half block, two to three pillow orthopnea, and ankle edema. On physical examination Dr. Levinson found that Claimant's lungs had decreased breath sounds at the base. The physician noted that Claimant's chest X-ray was negative for pneumoconiosis. Dr. Levinson diagnosed Claimant with chronic obstructive pulmonary disease due to cigarette smoking, right upper lobe infiltrate, and lung abscess in his right upper lung lobe. (DX 12) I find that Dr. Levinson's opinion that Claimant does not have pneumoconiosis is reasoned and well-documented.

Dr. Abdul Rashid

Dr. Abdul Rashid (Board-certified in internal medicine) examined Claimant on February 9, 2006, and issued a report dated March 2, 2006. The physician did not state how many years of coal mine employment he credited Claimant with although he did consider that Claimant had a history of smoking two to three packs of cigarettes a day for 47 years but that Claimant quit smoking in 1995. Dr. Rashid relied on his physical examination of Claimant, and a chest X-ray, pulmonary function test, arterial blood gas study and an electrocardiogram all dated February 9, 2006. The physician noted that Claimant had undergone surgery in 2004 to drain a lung abscess and at that time he was diagnosed with chronic obstructive pulmonary disease, post obstructive pneumonitis, respiratory insufficiency, exacerbation of chronic obstructive pulmonary disease, and emphysema due to anthracosilicosis. Claimant reported experiencing sputum production, wheezing, dyspnea with very minimal exertion, cough, two to three pillow orthopnea, and intermittent paroxysmal nocturnal dyspnea. On physical examination Dr. Rashid found that Claimant's breath sounds were depressed but that no rales or rhonchi were present. The physician diagnosed Claimant with emphysema due to his more than 100 pack-year smoking

[5] Although the evidence shows that Dr. Kerrigan is Claimant's treating physician, I do not give controlling weight to his opinion as relevant evidence in the record substantially contradicts the physician. § 718.104(d)(5).

history. (DX 31) I find that Dr. Rashid's opinion that Claimant does not have pneumoconiosis is reasoned and well-documented.

As noted above, the chest X-ray evidence does not support a finding of the presence of pneumoconiosis. The medical opinion evidence also does not support a finding of the presence of pneumoconiosis. Weighing all of the evidence together, I find that Claimant has failed to establish the presence of pneumoconiosis by the current medical evidence.

2. Pneumoconiosis Arising Out of Coal Mine Employment

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish pneumoconiosis arising out of coal mine employment under § 718.203.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC

test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as "qualifying" under the regulations. Assessment of pulmonary function study results is dependent on Claimant's height, which was noted to be 68 inches and 69 inches. To rectify the discrepancy in height I averaged the two heights, which is 68.5 inches, and used that height in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

The current record contains the pulmonary function studies summarized below.

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
11/24/2004	DX 15	Dr. Levinson	69	1.36 0.89*	2.35 2.00*	28 20*	58% 44%*	Fair Fair*	Yes Yes*
02/09/2006	DX 33	Dr. Rashid	70	1.60 1.74*	3.06 3.16*	44 40*	52% 55%*	Good Good*	Yes Yes*

*post-bronchodilator

November 24, 2004 Pulmonary Function Study

This study produced qualifying values under the regulations. § 718.204(b)(2)(i). Dr. Levinson reported that Claimant's effort on the test was only fair. (DX 15) Dr. Michos reviewed the pulmonary function test and issued a report dated December 11, 2004. Dr. Michos found the test to be unacceptable because there was less than optimal effort, cooperation, and comprehension. Dr. Michos found a greater than five percent variation between the two best FVC and FEV_1 values and also found suboptimal MVV performance. (DX 16) It is well-established that pulmonary function tests are effort-dependent and no weight may be given to studies where Claimant puts forth poor effort. Houchin v. Old Ben Coal Co., 6 B.L.R. 1-1141 (1984). Therefore, I find that the November 24, 2004 pulmonary function test is invalid.

February 9, 2006 Pulmonary Function Study

This study produced qualifying values under the regulations. § 718.204(b)(2)(i). As the test results contained the required flow volume loop tracings, a notation that Claimant's effort was acceptable, and there is no other evidence challenging its validity, I find that the February 9, 2006 pulmonary function test is valid.

In sum, I find that the weight of the pulmonary function study evidence supports a finding of total disability pursuant to § 718.204(b)(2)(i).

The current record contains the arterial blood gas studies summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
08/02/2004	DX 14	Dr. Levinson	44 44*	68 74*	No No*
02/09/2006	DX 32	Dr. Rashid	43	67	No

*post-exercise

The blood gas studies did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). The current record contains several reports of physicians.

Dr. Kerrigan opined that Claimant's "respiratory status . . . is severely impaired. . ." (CX 1) I infer from this that Dr. Kerrigan is of the opinion that Claimant is totally disabled. However, as stated above, the physician failed to explain what medical evidence he relied upon in coming to that conclusion. Therefore, I find that Dr. Kerrigan's opinion that Claimant is totally disabled is unreasoned and undocumented and entitled to no weight.

Dr. Levinson opined that Claimant's respiratory impairment was "fairly severe and would preclude him from performing his last coal mine employment." I infer from this that Dr. Levinson is of the opinion that Claimant is totally disabled as defined by the Act. In coming to this conclusion, the physician relied on his physical examination of Claimant, a chest X-ray, pulmonary function test, arterial blood gas study, and an electrocardiogram all dated August 2, 2004. On physical examination Dr. Levinson found that Claimant's lungs had decreased breath sounds at the base. The physician also noted that Claimant's pulmonary function test showed a significant decrease in the FEV_1 and FVC values with fair effort. Dr. Levinson also noted that Claimant's arterial blood gas study showed mild hypoxemia at rest with some improvement post-exercise. (DX 12) Although Dr. Levinson relied on a pulmonary function study that I found invalid, the results of Claimant's valid February 9, 2006 pulmonary function test were also qualifying. Further, the physician recognized that Claimant's effort was less than optimal when he evaluated the pulmonary function test results. Therefore, I find that Dr. Levinson's opinion that Claimant is totally disabled is reasoned and well-documented.

Dr. Rashid opined that Claimant was "impaired due to obstructive pulmonary disease." In coming to this conclusion the physician relied on his physical examination of Claimant, and a chest X-ray, pulmonary function test, arterial blood gas study and an electrocardiogram all dated February 9, 2006. On physical examination Dr. Rashid found that Claimant's breath sounds were depressed but that no rales or rhonchi were present. The physician also found that Claimant was unable to undergo the exercise portion of the arterial blood gas study. (DX 31) Although Dr. Rashid opined that Claimant was impaired he did not state the extent of the impairment. Therefore, I find that Dr. Rashid's opinion is equivocal and entitled to no weight.

As previously noted, the pulmonary function tests support a finding of total disability while the arterial blood gas studies do not. The medical opinion evidence also supports a finding of total disability. Based on the forgoing, Claimant has established this element of entitlement by the current evidence.

4. Total Disability Due to Pneumoconiosis

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish total disability due to pneumoconiosis under § 718.204(c)(2).

G. Review of Entire Record

Claimant has established a material change in conditions under § 725.309(d) by proving through the new medical evidence that he is totally disabled, one of the elements that had been previously adjudicated against him. Therefore, the entire record must be considered.

The prior record contains two interpretations of Claimant's August 3, 2002 chest X-ray, one positive and one negative for pneumoconiosis by equally qualified physicians. Thus, the two interpretations cancel out each other. The prior record also contains a qualifying pulmonary function test and a non-qualifying arterial blood gas study. There is also a physician's opinion by Dr. Talati diagnosing Claimant with chronic obstructive pulmonary disease due to smoking. The physician also found that Claimant had a moderate pulmonary impairment that he attributed to Claimant's history of coal mine employment and smoking history. However, Dr. Talati relied on an inflated coal mine employment history of four years, while I have found that Claimant has established only 1¼ years of coal mine employment. I therefore find that Dr. Talati's opinion regarding the etiology of Claimant's pulmonary impairment is entitled to no weight.

Weighing all of the medical evidence as a whole, I continue to find that Claimant has failed to establish the presence of pneumoconiosis. As Claimant has failed to establish the presence of pneumoconiosis, I need not consider whether the prior and current medical evidence when considered together establish the causation of Claimant's pneumoconiosis or whether he is totally disabled due to pneumoconiosis.

H. Conclusion

Although Claimant established a material change in conditions under § 725.309(d) by proving through the new medical evidence that he is totally disabled, Claimant was unable to establish the remaining elements of entitlement. Therefore, his claim must be denied.

ORDER

The claim of RICHARD CHARLES ACHUFF for benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).